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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SCC ACQUISITIONS, INC., et al.,

Cross-complainants and Appellants,

v.

CENTRAL PACIFIC BANK,

Cross-defendant and Respondent;

FILLMORE SUN, LLC.,

Intervener and Appellant.

G045718

(Super. Ct. No. 30-2008-0112660)

O P I N I O N

Appeals from an order of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

Jeffrey S. Benice for Cross-complainants and Appellants for Intervener and Appellant.

Frandzel Robins Bloom & Csato, Thomas M. Robins, III and Bruce D. Poltrock Cross-defendant and Respondent.

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In this fourth appeal in this matter, appellants SCC Acquisitions, Inc. (SCC), Bruce Elieff, and Fillmore Sun, LLC (Fillmore Sun, collectively appellants) appeal from an order of the superior court awarding Central Pacific Bank (the bank) attorney fees pursuant to Civil Code section 1717 (all statutory references are to the Civil Code unless otherwise stated) and Code of Civil Procedure section 1021. We affirm. The language of the contracts was broad enough to cover payment of attorney fees in both contract and tort actions.

I

FACTS AND PROCEDURAL BACKGROUND

“In August 2005, the bank loaned Fillmore Sun over \$7.3 million for costs involved in purchasing certain property and for ‘paying the predevelopment costs related to the development of the Property.’ Under the terms of the one-year loan, Fillmore Sun would pay only the interest on the loan until the maturity date of the loan, August 24, 2006, at which time the entire principal would be due. The loan also contained a provision affecting the maturity date: If there were no uncured default outstanding at the time of the maturity date, in the bank’s sole and absolute opinion and judgment the maturity date would be extended to February 24, 2007. The clause also provided ‘[t]he granting of such extension, however, is not intended to imply any agreement for any other or further extension of the Maturity Date.’ [SCC and Elieff] guaranteed payment of the loan.” (*SCC Acquisitions v. Central Pacific Bank* (2012) 207 Cal.App.4th 859, 861 (*SCC Acquisitions I*).)

The loan was extended five times, the last time to April 26, 2008. “On April 16, 2008, the bank decided to sell a number of its outstanding loans, including the Fillmore Sun loan, in a loan pool sale. Prior to that time, the bank did not anticipate selling the Fillmore Sun loan. In July 2008, the bank sold the loan to Gray 1 CPB, LLC (Gray 1), in the loan pool sale. Fillmore Sun was in default on the loan at that time. Gray

1 then sued the guarantors. It filed suit against SCC in September 2008, and subsequently filed suit against Elieff, as his guarantee was to pay if SCC failed to perform.” (*SCC Acquisitions I, supra*, 207 Cal.App.4th at p. 862.) SCC and Elieff “cross-complained against the bank. The causes of action included rescission based on sham guaranties, breach of contract and the implied covenant of good faith and fair dealing, promissory estoppel, and intentional fraud based on suppression of facts.” (*Ibid.*) Fillmore Sun filed a complaint in intervention.

The trial was conducted in two phases. In phase I, the court heard Gray 1’s cause of action against SCC and Elieff. Also tried in phase I was SCC and Elieff’s cause of action against the bank for rescission based on sham guarantees. That phase resulted in a judgment in excess of \$9 million in favor of Gray 1. (*SCC Acquisitions I, supra*, 207 Cal.App.4th at p. 862.) Additionally, the trial court ruled against SCC and Elieff’s sham guaranty claim in phase I. Appellants filed a notice of appeal after completion of phase I, but that appeal was subsequently dismissed. (*Gray 1 CPB, LLC v. SCC Acquisitions, Inc.* (G044310, May 25, 2011).

SCC and Elieff’s remaining causes of action were tried in phase II of the trial. At the conclusion of phase II, the superior court decreed SCC and Elieff should recover nothing on their complaint, Fillmore Sun should take nothing on its complaint in intervention, and entered judgment in favor of the bank. The court further found the bank “is entitled to recover its attorney fees and costs pursuant to a cost bill and motion for attorney fees to be filed within the time allowed by law.” SCC and Elieff, but not Fillmore Sun, appealed from the judgment rendered in phase II. That appeal was decided in *SCC Acquisitions I*. Whether the bank was entitled to attorney fees was not raised as an issue in that appeal.

After phase II concluded, the bank brought a motion seeking \$779,570.67 in attorney fees. Paragraph 7.12 of the contract between Fillmore Sun and the bank

contained a number of provisions for the payment of attorney fees by Fillmore Sun to the bank. Paragraph 7.12.1 required payment of “[a]ttorneys’ fees and out-of-pocket expenses incurred by [the bank] in connection with the . . . administration of this Agreement and any other Loan Document *and any matter related thereto . . .*” (Italics added.) Paragraph 7.12.2 required Fillmore Sun to pay “[t]he costs and expenses of [the bank] in connection with the enforcement of this Agreement and any other Loan Document and *any matter related thereto*, including the fees and out-of-pocket expenses of any legal counsel, independent public accountants, and other outside experts retained by Lender and including all costs and expenses of enforcing any judgment or prosecuting any appeal of any judgment order or award *arising out of or in any way related to the Loan*, this Agreement, or the loan documents . . .” (Italics added.) And Paragraph 7.12.3 required Fillmore Sun to pay “[a]ll costs, expenses, fees, premiums, and other charges relating to or arising from the Loan Documents or any transactions contemplated thereby . . .”

Paragraph 21 of the guaranties signed by SCC and Elieff were identical. That paragraph provided: “Guarantor agrees to pay [the bank], on demand, *reasonable attorneys’ fees and all other costs and expenses which may be incurred by [the bank] in the collection or attempted collection from [Fillmore Sun] of any Credit and/or in the interpretation, enforcement by [the bank] of this Guaranty or any collateral therefore, including but not limited to, proceedings in any bankruptcy or other insolvency case or other proceeding touching the Credit or this Guaranty*, or both in any manner, *whether or not legal proceeding or suit are instituted*, together with interest thereon at the rate applicable to the Credit and including, without limitation, all attorneys’ fees and related costs of enforcement of any and all judgments and awards and upon any appeal relating thereto.” (Italics added.)

In ruling on the banks' request for attorney fees, the court noted the amount sought by the bank was approximately one-half the fees awarded to Gray 1, notwithstanding the fact the bank was involved in both phases of the trial and Gray 1 was only involved in the first phase. The court further observed appellants incurred \$1.3 million in attorney fees in connection with phase II of the trial and they sought to recover that amount from the bank. The court found the bank was entitled to recover its attorney fees under section 1717 and Code of Civil Procedure section 1021, concluding the attorney fee language in the loan guarantee contracts was broad enough to cover tort claims arising out of the loan agreement as the various causes of action were "inextricably intertwined."

II

DISCUSSION

Code of Civil Procedure section 1032 entitles a prevailing party to its costs. (Code of Civ. Proc., § 1032, subd. (b); *Vons Cos., Inc. v. Lyle Parks Jr., Inc.* (2009) 177 Cal.App.4th 823, 832.) The bank was the prevailing party in this matter, the court having denied appellants relief on each of their causes of action and entered judgment in the bank's favor on each of appellants' causes of action. (*SCC Acquisitions I, supra*, 207 Cal.App.4th at p. 863.)

A contract may contain a provision providing for attorney fees in enforcing the contract. When the contract contains such a provision, the court must fix reasonable attorney fees as an element of the costs of the lawsuit. (§ 1717, subd. (a); Code of Civ. Proc., § 1033.5, subd. (a)(10)(A).) A contract may also provide for the award of attorney fees on tort causes of action arising out of the contractual relationship. (*Lerner v. Ward* (1993) 13 Cal.App.4th 155, 157; Code of Civ. Proc., § 1021.)

The trial court awarded the bank \$779,570.67 in attorney fees. "The 'experienced trial judge is the best judge of the value of professional services rendered in

his court” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) “‘It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court [Citations.] The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citation.] The trial court may make its own determination of the value of the services contrary to, or without the necessity for, expert testimony. [Citations.] The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.’ [Citation.]” (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096. Thus, the trial court has broad authority in determining a reasonable amount of attorney fees (*id.* at p. 1095) and we uphold a trial court’s award absent an abuse of discretion. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.)

Subdivision (a) of section 1717 provides in pertinent part: “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.” Appellants first argue the bank is not entitled to any attorney fees because it did not prevail on a contract claim, citing *Santisas v. Goodin* (1998) 17 Cal.4th 599, 615, and *Deane Gardenhome Assn. v. Denktas* (1993) 13 Cal.App.4th 1394, 1397. The contention is without merit.

Santisas v. Goodin, *supra*, 17 Cal.4th 599, is inapposite. There the Supreme Court phrased the issues this way: “When a plaintiff has voluntarily dismissed before trial an action asserting both tort and contract claims, all of which arise from a real estate sales contract containing a broadly worded attorney fee provision, may the

defendant recover any of the attorney fees incurred in defending the action? Or is any or all of such recovery precluded by either . . . section 1717 or this court's decision in [*International Industries, Inc.*] v. *Olen* [(1978)] 21 Cal.3d 218?" (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 602.) The court held "that in voluntary pretrial dismissal cases, . . . section 1717 bars recovery of attorney fees incurred in defending contract claims, but that neither . . . section 1717 nor [*International Industries v.*] *Olen* [(1978)] 21 Cal.3d 218, bars recovery of attorney fees incurred in defending tort or other non contract claims." (*Santisas v. Goodin*, *supra*, 17 Cal.4th at p. 602.) There is nothing in the record indicating appellants voluntarily dismissed any cause of action. In any event, even when there has been a voluntary dismissal, the terms of the contractual attorney fee provision determine whether attorney fees incurred in defending tort or other contractual claims may be recovered. (*Ibid.*)

Deane Gardenhome Assn. v. Denktas, *supra*, 13 Cal.App.4th 1394, does not apply either. There, the issue was whether the trial court properly *denied* Denktas attorney fees on the ground the Denktases were not a prevailing party. The homeowners association sued the Denktases for allegedly painting their house in violation of the associations restrictive covenants (CC&R's). (*Id.* at pp. 1395-1396.) The trial court entered judgment in favor of the Dentkases, but denied their request for attorney fees notwithstanding a provision in the CC&R's providing for fees, finding the Dentkases were not prevailing parties. (*Id.* at pp. 1396-1397.) The appellate court concluded the trial court abused its discretion in finding the Dentkases were *not* a prevailing party. (*Id.* at p. 1397.) The present case does not involve a question of which party prevailed. Clearly, the bank did. Appellants lost on every cause of action.

Appellants contend, however, the bank did not prevail "on a contract" and section 1717's attorney fee provisions do not apply to the tort causes of action alleged against the bank, citing *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338 in

support of their position. In *Xuereb*, the Xuerebs brought suit against Marcus & Millichap, Inc., a real estate broker, alleging a number of causes of action arising out of a real estate transaction. The real estate contract contained a provision for the award of attorney fees to the prevailing party “[i]f this Agreement gives rise to a lawsuit or other proceeding between any of the parties hereto.” (*Id.* at p. 1340.) The complaint contained causes of action for negligence, products liability, fraud, misrepresentation, and alleged the property had been delivered in a defective condition. The jury returned its verdict in favor of the Xuerebs on the tort causes of action, but the contract cause of action was not submitted to the jury. (*Id.* at p. 1341.) Although the Xuerebs prevailed at trial, the court did not award attorney fees, concluding the case was tried on tort theories, not contract theories. (*Id.* at p. 1340.)

A decision about whether a party is entitled to attorney fees begins with Code of Civil Procedure section 1021. “Except as attorney’s fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.” (Code Civ. Proc., § 1021.) This section permits the parties to agree on the allocation of attorney fees and does not limit “its application to contract causes of action alone. It is quite clear from the case law interpreting Code of Civil Procedure section 1021 that parties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or contract. [Citations.]” (*Xuereb v. Marcus & Millichap, Inc., supra*, 3 Cal.App.4th at p. 1341.)

Although appellants are correct to the extent section 1717 and its attorney fee provision only apply to contract causes of action, that is not to say an attorney fee provision in a contract may not provide for the award of attorney fees on tort causes of action. (*Xuereb v. Marcus & Millichap, Inc., supra*, 3 Cal.App.4th at p. 1342 [purpose of

section 1717 is to make attorney fee provision in a contract reciprocal].) When a contract provides for payment of attorney fees outside of a contract cause of action, section 1021 of the Code of Civil Procedure is implicated. Consequently, whether a party to a contract is entitled to attorney fees on a tort cause of action depends on the language of the attorney fee provision in the contract. (*Xuereb v. Marcus & Millichap, supra*, 3 Cal.App.4th at p. 1342.) Hence, the question here is whether the language in the contracts providing for payment of attorney fees was broad enough to cover tort actions or actions other than for breach of contract.

We consider the language in each of the contracts. In the contract between the bank and Fillmore Sun, there are three attorney fee provisions: “7.12.1 Attorneys’ fees and out-of-pocket expenses incurred by Lender in connection with the negotiation, preparation, execution, delivery, and administration of this Agreement and any other Loan Document *and any matter related thereto*, including, but not limited to, the appraisal of the Property; [¶] 7.12.2 The costs and expenses of Lender in connection with the enforcement of this Agreement and any other Loan Document and any matter related thereto, including the fees and out-of-pocket expenses of any legal counsel, independent public accountants, and other outside experts retained by Lender and including all costs and expenses of enforcing any judgment or prosecuting any appeal of any judgment, order or award *arising out of or in any way related to* the Loan, this Agreement, or the Loan Documents; and [¶] 7.12.3 All costs, expenses, fees, premiums, and other charges relating to or arising from the Loan Documents and any transactions contemplated thereby or the compliance with any of the terms and conditions thereof, including, but not limited to, recording fees, filing fees, credit report fees, release or reconveyance fees, title insurance premiums, and the cost of realty tax service for the terms of the Loan.” (Italics added.)

The continuing guaranty signed by SCC and the limited guaranty signed by Elieff contained identical attorney fee provisions: “Guarantor agrees to pay [the bank], on demand, *reasonable attorneys’ fees and all other costs and expenses which may be incurred by [the bank]* in the collection or attempted collection from [Fillmore Sun] of any Credit and/or in the interpretation, . . . enforcement by [the bank] of this Guaranty or any collateral therefor, including but not limited to, proceedings in any bankruptcy or other insolvency case or *other proceeding touching the Credit or this Guaranty, or both, in any manner, whether or not legal proceeding or suit are instituted*, together with interest thereon at the rate applicable to the Credit and including, without limitation, all attorneys’ fees and related costs of enforcement of any and all judgments and awards and upon any appeal relating thereto.” (Italics added.)

In *Xuereb v. Marcus & Millichap, Inc.*, *supra*, 3 Cal.App.4th 1338 the appellate court found a contract provision for attorney fees “in any ‘lawsuit or other legal proceeding’ to which ‘this Agreement gives rise,’” was broad enough to cover causes of action for breach of contract and in tort. (*Id.* p. 1342.) Indeed, the court appeared to accept a “but for” test for determining whether the agreement gave rise to the cause of action. “It is clear that *but for* the Purchase Agreement by which the allegedly defective property was sold to respondents, the dispute between the parties would not have arisen. Certainly, but for the execution of the Purchase Agreement and the subsequent close of escrow, respondents would have had no basis on which to claim detrimental reliance or damages, as alleged in their lawsuit.” (*Id.* at pp. 1343-1344.)

In *Lerner v. Ward*, *supra*, 13 Cal.App.4th 155, the Lerner’s sued Ward for falsely representing the property they agreed to purchase could be subdivided. The Lerner’s dismissed the breach of contract cause of action before trial and proceeded to trial on the fraud cause of action. (*Id.* at p. 157.) The attorney fee provision in the purchase agreement provided for the payment of attorney fees to the prevailing party

“‘[i]n any action or proceeding arising out of this agreement’” (*Id.* at p. 159.) After acknowledging the Supreme Court has held a cause of action for fraud arising out of a contract is not an action “on a contract” within the meaning of section 1717 (*Ibid.*, citing *Stout v. Turney* (1978) 22 Cal.3d 718, 723, 730), the court found the language of the attorney fee provision in that case was broad enough to authorize an award of attorney fees on the tort cause of action under Code of Civil Procedure section 1021. (*Lerner v. Ward, supra*, 13 Cal.App.4th 159-160.) The court found the contract clause considered therein “was not limited merely to an action on the contract, but to any action or proceeding arising out of the agreement. This included any action for fraud arising out of that agreement.” (*Id.* at p. 160.)

We first look to the contract provision in the bank’s contract with Fillmore Sun. Paragraph 7.12.1 of the contract authorized attorney fees in “any matter related [to]” the loan agreement or any other loan document. Fillmore Sun’s complaint in intervention was “related to” the loan agreement. But for the loan agreement there would have been no action by Fillmore Sun. The language in paragraph 7.12.1 of the loan agreement was broad enough to require Fillmore Sun to pay attorney fees in this matter.

The attorney fee provision agreed to by SCC and Elieff was even broader. It required the payment of attorney fees in any “proceedings *touching* the Credit or this Guaranty, or both, *in any manner*, whether or not legal proceedings or suit are instituted.” (Italics added.) SCC and Elieff’s complaint filed against the bank certainly *touched* the guaranties made by the two; SCC and Elieff sought to rescind their guaranties. The goal of the complaint and each of the causes of action alleged therein, was to avoid having to make good on the guaranties. Even to the extent causes of action sought damages from the bank, those causes of action all *touched on* the guaranties. Each alleged wrong purportedly committed by the bank was inextricably bound to the guaranties. SCC and Elieff sought to avoid the guaranties by claiming they were sham guarantees. The breach

of contract cause of action alleged the guaranties were not enforceable. The promissory estoppel cause of action was based on the bank's alleged conduct in connection with a possible renegotiation of the guaranties, as were the causes of action for fraud, and unfair business practices. Accordingly, we conclude the attorney fee provisions in the respective contracts were broad enough to cover the tort actions.

Because we find the language in the attorney fee provisions were broad enough to cover not only actions for breach of contract, but also causes of action in tort, we reject appellants' assertion the bank must apportion its fees and costs between the contract cause of action litigated during phase I of the trial and the tort causes of action litigated in phase II. Additionally, appellants do not challenge the *reasonableness* of the fees awarded. Therefore, we summarily note the trial court set forth in its minute order the reasons for awarding the amount of fees it did.

Lastly, we reject appellants' contention the bank was not entitled to recover attorney fees incurred during phase I of the trial. Appellants argue that as the bank sold the loan to Gray 1, Gray 1 became the "lender" under the contract. According to appellants, there was only one "lender" and that was Gray 1. Appellants filed a cross-complaint against the bank. Part of the action was on the contract between the bank and appellants. The contracts between the bank and appellants provided for the payment of attorney fees. Such provisions apply when the prevailing party successfully defends against a breach of contract claim, as the bank did here. (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 865-866.)

The two cases cited by appellants do not support their position. *Purcell v. Colonial Ins. Co.* (1971) 20 Cal.App.3d 807, did not involve a situation analogous to the present matter. There, Purcell was involved in an automobile accident that killed two people and left another injured. The victims' next of kin offered to settle the matter for an amount within Purcell's policy limits, but the insurance company refused to settle.

Purcell subsequently entered in to an agreement with the next of kin whereby he assigned to them “any and all causes of action which he has or may have, now or in the future, against Colonial with respect to all matters arising out of said accident and the claims incident thereto, . . .” (*Id.* at p. 810, italics omitted.) The appellate court found the assignment of all causes of action arising out of the accident and claims incident thereto included Purcell’s claim for his pain and suffering he endured as the result of the insurance company’s refusal to settle. As a result, Purcell was not the real party in interest and the trial court properly granted the insurance company judgment on the pleadings. (*Id.* at pp. 814-815.) The present matter does not involve a suit for a cause of action assigned to another party. Indeed, the bank did not file suit against appellants. Appellants filed suit against the bank.

Heppler v. J.M. Peters Co. (1999) 73 Cal.App.4th 1265 is of no assistance either. There, the main issue was whether the indemnity contracts required fault on the subcontractors’ part before the indemnity provision kicked in. (*Id.* at p. 1275.) As far as attorney fees were concerned, the contracts provided plaintiffs were responsible for the subcontractors’ attorney fees if the subcontractors prevailed. (*Id.* at p. 1290.) “In short, the moment the plaintiffs took the assignment, they had total control of the litigation. Plaintiffs were primed to take the benefits of an award of attorney fees if they won; thus it was reasonable for the court to infer plaintiffs were prepared to take the concomitant obligation to pay attorney fees under Civil Code section 1717 if they lost.” (*Id.* at p. 1291.)

The present situation is completely different. The bank was not initially a party to Gray 1’s lawsuit to compel SCC and Elieff to make good on their guaranties. The bank only became involved in the matter when SCC and Elieff cross-complained against it. Appellants presented no convincing argument for denying the bank the

attorney fees the bank and appellants contracted for. Accordingly, we find the trial court did not err in awarding the bank attorney fees.

III

DISPOSITION

The order of the superior court awarding attorney fees to the bank is affirmed. The bank shall receive its costs on appeal.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.